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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

No. 38

HAROLD T. GRISWOLD, W. W. S. CARPENTER, AND LAIRD BELL, EXECUTORS OF THE ESTATE OF WILLIAM H. REDINGTON, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

WM. N. HADDAD,
Counsel for Petitioners.

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During the oral argument in this case, counsel for the petitioners was asked if the statute was not construed as it was in *Knox* v. *McElligott*, 258 U. S. 546, in order to avoid the constitutional doubts which would have arisen on a contrary construction; and further, if these doubts have not been largely removed by subsequent cases. Counsel answered yes to both questions. Counsel's answer to the second question was not accurate—at least, it should have been amplified. Because we believe that the decision in this case overrules the reasoning in *Knox* v. *McElligott*, and because we feel that this result may have been reached on the assumption (based on counsel's improvident admission) that the constitutional

doubt which was present in the *Knox* case no longer exists, we are filing this petition for rehearing.

We submit that if a different construction had been adopted in *Knox* v. *McElligott*, the statute would have been unconstitutional. The statute provides for the inclusion in the gross estate of property "to the extent of the interest therein held jointly — — by the decedent and any other person." The "interest held jointly" consists of the decedent's half and the survivor's half. It must be conceded that a tax on the decedent's half would be constitutional whether the property was placed in joint tenancy before or after the passage of the act. In a practical sense, this half passes to the survivor at the date of the decedent's death, so a tax on its transfer cannot be said to be retroactive. (The tax in the present case, therefore, is not retroactive, and cannot be attacked on constitutional grounds.) But it is equally clear that a tax on the survivor's half of property held in joint tenancy since before 1916, would be unconstitutional, because it would be retroactive within the meaning of *Nichols* v. *Coolidge*, 274 U. S. 531, and *Untermyer* v. *Anderson*, 276 U. S. 440.

This view is not inconsistent with *Gwinn* v. *Commissioner*, 287 U. S. 224, because the *Gwinn* case involved a tax on only one-half (the decedent's half) of the property. Nor is it inconsistent with *Third National Bank* v. *White*, 287 U. S. 577. That case had to do with a tenancy by the entirety which, for this purpose, is essentially different from a joint tenancy. A tenant by the entirety has nothing which he can really regard as his own as long as his cotenant is living. In a certain sense he owns a half interest in the property; but he cannot sell or mortgage this interest, or give it away, or sever it, without the concurrence of the other tenant. His

rights "are hedged about at all points" by the equal rights of the cotenant (*Tyler* v. *United States*, 281 U. S. 497). The death of one tenant by the entirety, therefore, results in "important and definite accessions" to the rights of the other, not only with respect to the decedent's half, but with respect to the entire property.

This is not true of a joint tenancy. In the case of a joint estate, each tenant has complete control of his share. He can sell this share, or mortgage it, or give it away, without his cotenant's consent. *Lawler* v. *Byrne*, 252 Ill. 194; *Szymczak* v. *Szymczak*, 306 Ill. 541; *Hardin* v. *Wolf*, 318 Ill. 48; *Liese* v. *Hentze*, 326 Ill. 633. And he can sever the tenancy at any time by partition proceedings. *Barr* v. *Barr*, 273 Ill. 621. Except for the shadowy distinction between a general power and a limitation in fee (See *Bullen* v. *Wisconsin*, 240 U. S. 625), each joint tenant is the absolute owner of his half of the property from the moment that the estate is created. With respect to this half, the death of the cotenant does not transfer to the survivor any substantial rights which he did not have before, and such death, therefore, cannot be made the occasion for an excise tax (on the surviving tenant's half).

The incidents of a tenancy by the entirety are such that each tenant in effect has a life interest in one-half of the property and a contingent remainder in the whole—*i. e.*, contingent on his surviving the other tenant. The death of the other tenant ripens this contingency into actual ownership. It gives the surviving tenant the usual rights and powers of an owner, which rights and powers he did not previously enjoy with respect to any portion of the property.

On the other hand, in the case of a joint tenancy, each tenant in substance has a life estate and a *vested* remain-

der in one-half of the property (subject to be divested by his dying before his cotenant and before the estate is severed), and a contingent remainder in the other half (subject to a converse contingency). The death of one tenant converts the contingent remainder into a present estate and terminates the decedent's power to destroy that remainder by a severance. In a word, it transfers the decedent's half of the property to the survivor. This half can be made the subject of a transfer tax. But the death has no such effect on the other half. As to that half, the only effect that the death has is to convert a vested remainder into an estate in possession. This conversion cannot be made the subject of a succession tax. *Coolidge* v. *Long,* 282 U. S. 582. It is true that the death of one joint tenant relieves the interest of the survivor from the divesting contingency. But this contingency is not substantial because the survivor himself could have removed it at any time by severing the estate (through a sale, mortgage, gift, partition proceedings, etc.).

We therefore believe that if *Knox* v. *McElligott* were to come up to-day it would have to be decided the same way, whether on the ground that the statute is inapplicable or that it is unconstitutional. The Board of Tax Appeals has just decided a case (*Goodenough* v. *Commissioner,* Docket No. 32059, October 31, 1933) holding that in view of *Knox* v. *McElligott,* no part of property owned by the decedent and his wife as tenants by the entirety since 1915 is taxable under the Revenue Act of 1921. If that case or any similar case ever reaches this court, this court will have to decide what effect the present decision has had on *Knox* v. *McElligott.* If *Knox* v. *McElligott* is wrong and is to be regarded as having been overruled, then the statute, in so far as it applied to the interest involved in the *Knox* case was unconstitutional.

If both *Knox* v. *McElligott* and the decision in the present case are to stand, then the statute must be regarded as applying to one-half and only one-half of property held in joint estates created prior to 1916. But the language of the statute will not admit of such a construction. Section 402 (d) of the Revenue Act of 1921 provides for the inclusion of the "interest held jointly" (not a half or any other fraction of that interest). It contains special provisions for the exclusion of a portion of the property in exceptional cases: it excludes the portion of the property which is shown to have originally belonged to the surviving tenant; it provides that where property is acquired by gift or bequest and the interests of the tenants are not specified or fixed by law, only one-half of the property should be included. This enumeration of specific cases where only a portion of the property is to be taxed shows an unmistakable intention to include the entire property in all other cases. It follows that if the statute applies to one-half of the property, as held in the present case, it applies to the other half as well. And if, as decided in *Knox* v. *McElligott*, the statute does not cover the entire value of property held in a previously created joint tenancy, the statute does not cover any portion of that property.

There is but one way of reconciling the decision in the present case with the decision in *Knox* v. *McElligott*, and that is to say that the result reached in *Knox* v. *McElligott* was correct because the statute, though applicable to the interest involved in that case, was, as so applied, unconstitutional. In other words, the court in the present case may be overruling the reasoning in *Knox* v. *McElligott* and may be justifying the decision in the *Knox* case solely on constitutional grounds. If that is so, then it seems to us that contrary to the settled practice of this

court, it is, in effect, deciding a constitutional question which does not arise in the case now before it and which can very easily be avoided by adhering to a construction which it adopted in an earlier decision and which for years has been accepted as the correct construction.

We respectfully submit that there is no occasion to overrule either the reasoning or the decision in *Knox* v. *McElligott* and no occasion to distinguish that case in a way which puts an artificial construction on the statute—a construction which, we believe, does violence to the language used, and makes the statute mean one thing when applied to estates created before its passage and another thing when applied to estates created afterwards. Such an anomalous result can easily be avoided by affirming the reasoning in *Knox* v. *McElligott* and applying it to the present case.

Respectfully submitted,

WM. N. HADDAD,
Counsel for Petitioners.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

WM. N. HADDAD,

SUPREME COURT OF THE UNITED STATES.

No. 38.—October Term, 1933.

Harold T. Griswold, W. W. S. Carpenter, and Laird Bell, Executors of the Estate of William H. Redington, Deceased, Petitioners, *vs.* Guy T. Helvering, Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[November 6, 1933.]

Mr. Justice Sutherland delivered the opinion of the Court.

Section 402 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 277, 278, imposing an inheritance tax, provides,

"Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property,

"(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, . . ."

The decedent died in 1923, while the foregoing provision was in effect. At the time of his death he and his wife held as joint tenants certain real estate in Illinois, title to which vested in them by conveyance on October 5, 1909. The commissioner valued this real estate at $90,000, and included the whole of it in the value of decedent's gross estate as being within the reach of § 402 (d). Upon appeal to the Board of Tax Appeals, that tribunal, disapproving in part the commissioner's determination, held that the value of only decedent's one-half of the property could be included for the purposes of the tax. 23 B. T. A. 635. The circuit court of appeals affirmed. 62 F. (2d) 591.

Whether this application of the statute gives it retroactive effect is the sole question here involved; and with that we find no difficulty. Under the statute the death of decedent is the event in respect of which the tax is laid. It is the existence of the